

The ALJ found claimant was entitled to a 47.5 percent permanent partial general bodily disability based upon the average of a 40 percent task loss and a 55 percent wage loss. Respondent argues claimant should be denied a work disability because his work

restrictions recommended by the physicians were based primarily upon claimant's subjective complaints which are not credible. Respondent contends claimant's permanent partial disability award should be limited to his five percent functional impairment.

Conversely, claimant argues that he is entitled to a higher work disability award than that entered by the ALJ because the task loss percentage utilized by the ALJ was too low. Instead, the ALJ should have found claimant's task loss to be 54.5 percent based upon an average of the opinions given by the two physicians that testified to claimant's task loss. When the 54.5 percent task loss is averaged with the 55 percent wage loss, claimant's work disability becomes 54.75 percent. Claimant also requests that ongoing medical treatment with Dr. Edward Wilson be specifically ordered as authorized medical treatment.

The nature and extent of claimant's disability and future medical treatment are the only issues raised for the Board' review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The ALJ's Award sets forth findings of fact and conclusions of law in some detail. It is not necessary to repeat those herein. The Board adopts the ALJ's findings and conclusions to the extent they are not specifically modified herein. In particular, the Board agrees that claimant has proven a five percent functional impairment and has further proven that he is entitled to a work disability award in excess of his percentage of functional impairment.

K.S.A. 44-510e(a) provides that the percentage of permanent partial general disability is the average of claimant's actual wage loss and his percentage of task loss. The ALJ found claimant was entitled to temporary total disability compensation (TTD) through February 1, 2003. TTD was ordered paid after claimant had been found to be at maximum medical improvement (MMI) and released with permanent work restrictions because respondent failed to provide claimant with the release and restrictions until on or about that date. Respondent was unable to accommodate claimant's restrictions and, therefore, did not return claimant to work. As a result, claimant was unemployed and looking for work until he found part time employment with a Super 8 Motel beginning May 1, 2003. On that date, claimant started working and earning \$6 per hour for 24-hours per week or \$144 until July 17, 2003, when he began working full time. Thereafter, claimant worked 40 hours per week at \$6 per hour for a gross average weekly wage of \$240. Accordingly, claimant's wage loss was 100 percent from February 1, 2003 through April 30, 2003, 73 percent from May 1, 2003 through July 16, 2003 (\$144 divided by \$532.76) and 55 percent beginning July 17, 2003 (\$240 divided by \$532.76). The ALJ's award calculation utilized the final 55 percent wage loss. Given the methodology for calculating a permanent partial disability award, it makes no difference in either the weekly benefit or the total compensation paid to use the last wage loss percentage in this case. Accordingly, the Board affirms that portion of the ALJ's Award.

The ALJ found claimant's task loss to be 40 percent, which the ALJ described as the task loss opinion given by Dr. Wilson, whose opinion the ALJ found was the more accurate opinion. The ALJ then averaged this 40 percent task loss with the 55 percent wage loss to find a 47.5 percent work disability. Claimant disagrees with both the ALJ's finding that Dr. Wilson's opinion was 40 percent and with the ALJ's decision not to give equal weight to the task loss opinion given by Dr. Sergio Delgado. Dr. Delgado opined that claimant had lost the ability to perform 35 of the 52 work tasks identified by claimant's vocational expert, Monte Longacre. This results in a 67 percent work task loss. Utilizing Mr. Longacre's task list, Dr. Wilson opined that claimant had lost the ability to perform 22 of the 52 total non-duplicative tasks when the tasks were analyzed together as an aggregate and not individually.¹ This results in a 42 percent work task loss. In addition, Dr. Wilson reviewed the task list prepared by respondent's vocational expert, Ms. Karen Terrill. That list contained 75 separate tasks of which Dr. Wilson opined that claimant could no longer perform 18, for a 24 percent task loss. Claimant argues that Dr. Wilson failed to give an opinion concerning one of the tasks on Ms. Terrill's list and therefore Dr. Wilson opinion should be 24 percent based upon claimant having lost the ability to perform 18 of 74 tasks. However, the Board does not believe that the task which Dr. Wilson omitted should be subtracted from the total task list. It is claimant's burden of proof to establish task loss and, therefore, if a physician fails to give an opinion on a task then the Board will treat that task as being within claimant's ability to perform. In other words, claimant failed to prove that claimant could not perform that task in the opinion of Dr. Wilson where no opinion was given as to that task. As a practical matter, it makes no difference in this instance as the percentage of loss rounds off to 24 percent in any event.

Although claimant argues that equal weight should be given to the opinions of Dr. Delgado and Dr. Wilson, the Board disagrees. Instead, the Board agrees with the logic employed by the ALJ to only use the opinion of Dr. Wilson. Accordingly, the Board will average the task loss opinion given by Dr. Wilson with the claimant's actual wage loss to find claimant's percentage of work disability. However, the ALJ only utilized Dr. Wilson's opinion based upon the task list prepared by claimant's expert, Mr. Longacre. The ALJ gave no explanation for ignoring the task loss opinion of Dr. Wilson utilizing the task list prepared by respondent's expert, Ms. Terrill. Although claimant argues that Mr. Longacre's task list is more accurate the Board finds both task lists to be accurate and will average the two opinions to arrive at the final task loss opinion of Dr. Wilson. Averaging the 42 percent task loss opinion utilizing Mr. Longacre's list and the 24 percent opinion utilizing Ms. Terrill's list results in a 33 percent task loss in the opinion of Dr. Wilson. Averaging the 33 percent task loss with the 55 percent wage loss results in a 44 percent work disability.

In addition, claimant argues for the first time on appeal that he should be awarded ongoing medical care with Dr. Wilson including authorization for a TENS unit. In his submission brief to the ALJ as to future medical treatment, claimant requested "an award

¹See *Haywood v. Cessna Aircraft Co.*, 31 Kan.App.2d 934, 79 P.3d 179 (Aug. 16, 2002).

of future medical treatment upon proper application and approval of the Director of Workers' Compensation."² In his Award, Judge Benedict ordered that "[f]uture medical will be considered upon proper application ."³ The Board finds that claimant should first request additional medical treatment from the ALJ.

Finally, the ALJ entered an award whereby claimant's entitlement to payment of the permanent partial disability compensation would commence while claimant was also receiving TTD. The Board considers this to be error and will correct the award calculation to provide for permanent partial disability compensation to commence after payment of the TTD compensation. The Board otherwise adopts and approves the findings, conclusions and orders of the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 14, 2003, is modified as follows:

The claimant is entitled to 25.85 weeks of temporary total disability compensation at the rate of \$355.19 per week or \$9,181.65 followed by 177.83 weeks of permanent partial disability compensation at the rate of \$355.19 per week or \$63,163.44 for a 44 percent work disability, making a total award of \$72,345.10.

As of April 21, 2004, there would be due and owing to the claimant 25.85 weeks of temporary total disability compensation at the rate of \$355.19 per week in the sum of \$9,181.66 plus 65.72 weeks of permanent partial disability compensation at the rate of \$355.19 per week in the sum of \$23,343.09 for a total due and owing of \$32,524.75, which is ordered paid in one lump sum less amounts previous paid. Thereafter, the remaining balance in the amount of \$39,820.35 shall be paid at the rate of \$355.19 per week for 112.11 weeks or until further order of the Director.

IT IS SO ORDERED.

² Claimant's Submission Brief at 10 (filed October 17, 2003).

³Award (Nov. 14, 2003).

Dated this _____ day of April 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director